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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1885

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE WASHINGTON POST COMPANY, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE RESPONDENTS

QUESTIONS PRESENTED

In this case, in which the Government seeks a reversal of an order affirming denial of a preliminary injunction, the questions presented are:

1. Whether the District Court clearly abused its discretion when it denied the Government's motion to enjoin, *pendente lite,* The Washington Post (hereinafter "the Post") from publishing documents and in-

formation drawn from a classified historical document on the involvement of the United States in the Vietnam conflict where the District Court, on a concededly full record, found that the Government had failed to demonstrate that publication would constitute a threat to national security?

2. Should this Court review the holdings below when there has been no claim by the Government (a) that the findings of the District Court were "clearly erroneous" or (b) that the Government did not have an opportunity fully and fairly to present its case?

3. Would the issuance of a preliminary injunction in the circumstances of this case constitute a prohibited prior restraint within the meaning of *Near* v. *Minnesota*, 283 U.S. 697?

4. In view of the widespread publication of the contents of the Vietnam History by other newspapers throughout the United States against which the Government has chosen not to proceed, should this Court now direct dismissal of this case because the issuance of injunctive relief would be futile?

STATEMENT OF THE CASE

Thirteen days ago, The New York Times ("the Times") began publication of a series of articles based upon the contents of a document entitled "History of U.S. Decision Making Process on Vietnam Policy" (the "Vietnam History"), covering the period from 1945 to March, 1968, which was prepared in 1967-68 at the direction of then Secretary of Defense Robert McNamara.

After the Times had published three installments of its series, the Government filed suit against the Times

to enjoin publication of the balance of the series, and, on June 15, obtained a temporary restraining order prohibiting further publication.

On June 18 and 19, the Post published two articles derived from portions of the Vietnam History. This action ensued.

The Government's suit against the Post commenced on the evening of June 18 with an application by the Government to the District Court for a temporary restraining order prohibiting further publication of any material derived from the Vietnam History. In this connection, the Government represented to the District Court that continued publication of the Post's series would result in immediate and irreparable injury to the national defense.

The District Court, noting the absence of specificity in the Government's representations, denied the temporary restraining order on the authority of *Near* v. *Minnesota,* 283 U.S. 697. The Government took an immediate appeal. Responding to the Government's plea of urgency and irreparable injury, the Court of Appeals convened in extraordinary session late in the evening of June 18, and rendered its decision at about 1:30 a.m. on June 19.

A majority of the three-judge panel of the Court of Appeals held that, in view of the gravity of its charges, the Government should be given an opportunity to establish factually its claim that publication of the material would immediately and irreparably damage national security.

At the direction of the Court of Appeals, the District Court held an evidentiary hearing on June 21, 1971, at which the Government was given a full and fair oppor-

tunity to establish factually its claim. The hearing was for the most part held *in camera,* thus eliminating any inhibiting effect which a public trial could have on the proof to be offered in support of the Government's case.

Insofar as Respondents are advised, the Vietnam History consists of 47 volumes comprising approximately 7,000 pages of historic material anywhere from three to twenty-seven years old. The materials themselves consist of analyses and commentary, with supporting data, including cables, memoranda and other documents, newspaper clippings and transcripts of speeches by former public officials. As noted by the District Court, the Vietnam History includes "material in the public domain and other material that was Top Secret when written long ago but not clearly shown to be such at the present time." (Tr. 267) [1]

The documents in the possession of the Post are substantially fewer in number (approximately 4000 pages) and do not have the same pagination. The Post does not have a 1965 document entitled "Command and Control Study of the Tonkin Gulf Incident" prepared by the Defense Department's Weapons System Evaluation Group—a document apparently involved in the Government's case against the Times.

The entire 47 volume History is classified "Top Secret—Sensitive." The classification "Top Secret" [2] is defined by the Department of Defense as follows:

> TOP SECRET—The highest level of classification, TOP SECRET, shall be applied only to that in-

[1] References are to the transcript of testimony, since the record is not yet available to us.

[2] There apparently is no official "Top Secret—Sensitive" classification.

> formation or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in *exceptionally grave* damage to the Nation; such as, leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological development vital to the national defense. The use of the TOP SECRET classification shall be severely limited to information or material which requires the utmost protection. (emphasis supplied)

The record discloses that:

1. The overall classification of the Vietnam History was necessarily fixed by the highest classification of any source material on which it is based. By reason of this so-called "derivative classification" practice, such items as the public speeches of Presidents and other governmental officials are classified "Top Secret." (Tr. 16)

2. The originator of a document generally determines its classification; and this determination is not changed until and unless the classifier establishes conditions for automatic downgrading and declassification. (Tr. 30) Mr. McClain, the Security Classification Officer having prime responsibility for policing declassification, acknowledged that he received few requests for declassification of "Top Secret" documents. (Tr. 30) Similarly, Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asian and Pacific Affairs, testified that he rarely made recommendations that documents be declassified. (Tr. 55)

3. No attempt was made to segregate classified and nonclassified documents of the Vietnam History for

the purpose of avoiding overclassification (Tr. 16-17), nor had the Vietnam History been reviewed for purposes of downgrading and declassification. (Tr. 30-32) Mr. Doolin testified, however, that he had been reviewing the Vietnam History since 1969 in order to determine whether Senator Fulbright who had asked to see the study should be permitted access to it, and had recommended against making the Vietnam History available to the Senator. (Tr. 35-36)

In addition to evidence as to the classification process as related to the Vietnam History, there is evidence in the record that 15 copies were prepared, of which two went to former Secretaries McNamara and Clifford and two to the Rand Corporation. None were sent to the White House. (Lofdahl Aff. Pl. Ex. 1)[3]

The Respondents submitted eleven affidavits from reporters and editors of the Post to the effect that:

1. In the defense and foreign policy areas, the Government habitually overclassifies its documents. *See, e.g.*, the affidavit of Murrey Marder (Ds Ex. 6),[4] particularly at paragraph 15.

2. Government officials often disclose for publication, for various purposes, copies of classified documents or the contents of such documents; and the information thus disclosed is often published. *See, e.g.*, the affi-

[3] The Government also submitted affidavits *in camera* by Doolin, by William B. Macomber, Deputy Under Secretary for Administration of the Department of State (both of whom testified on cross-examination), by Lt. General Melvin Zais, Director of the Operations Directorate, Joint Staff, and by Admiral Gayler of the National Security Agency. This evidence is analyzed in Respondent's In Camera Analysis of The Evidence Submitted Under Seal.

[4] Respondents' exhibits are identified as "Ds Ex. —".

davits of Bernard D. Nossiter (Ds Ex. 9), Marylyn Berger (Ds Ex. 10), Ben Bagdikian (Ds Ex. 7), Chalmers Roberts (Ds Ex. 3) and Benjamin Bradlee (Ds Ex. 4).

3. Classified information disclosed to the press by Government officials has generally been handled by the press in a responsible fashion. *See, e.g.,* the affidavit of Ben Bagdikian (Ds Ex. 7, paragraph 5).

4. Because documents and information in the hands of the Government, particularly relating to national defense and foreign policy, are so extensively classified, it has become necessary for the press, in order to assure that the Government's version of events is accurate and complete, to secure from independent sources the content of classified information. *See, e.g.,* the affidavit of Murrey Marder (Ds Ex. 6), in which he says:

> "But a free press, if it is to remain free, cannot be bound by what the government disseminates in either classified or non-classified information; it must be free to test the validity of both by exercising its own resources to obtain contradictory versions of *both* types of information."

5. The information contained in the Vietnam History is largely confirmatory of material heretofore published. *See, e.g.,* the affidavits of Chalmers M. Roberts (Ds Ex 3, p. 7) and Murrey Marder (Ds Ex. 6, pp. 3-4).

The Opinions Below

On the full record developed before it, the District Court rejected all claims of the Government. More specifically, it held that:

(1) The Government had failed to prove that publication of material from the Vietnam History

would lead to any break in diplomatic relations, any armed attack on the United States or any of its allies, the revelation of any information respecting current troop movements, or any compromise of military or defense plans, intelligence operations, or scientific and technological materials;

(2) the Government had failed to demonstrate that publication of such material would result in any immediate, grave threat to the national security; and

(3) there was no likelihood that the Government would succeed on the merits.

In the light of these findings, the District Court held:

"Our democracy depends for its future on the informed will of the majority, and it is the purpose and effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate. The equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay."

On appeal, the Government did not challenge as "clearly erroneous" any of the findings of the District Court; and, so far as we presently can determine, it does not challenge those findings here.

The Court of Appeals for the District of Columbia, sitting *en banc*, affirmed. After a careful review of the record made before the District Court, seven of the nine judges of the Court of Appeals (including the two judges who had granted the Government's application for a temporary restraining order) held specifically that "the government's proof, judged by the standard

suggested in *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931), does not justify an injunction." Two of the judges would have given the Government yet another opportunity to try to prove its case. Only one of them, Judge Wilkey, found in the record anything even remotely justifying a prior restraint under the *Near* v. *Minnesota* standard.

On June 24, the Government filed a petition for a rehearing *en banc* seeking from the Court of Appeals essentially the same relief which the Second Circuit had accorded it in the *Times* case. In denying this application (7-2), the Court of Appeals noted that the Government had had an adequate opportunity to establish its case; that the Government had been reviewing the documents since November, 1969, to determine whether they should be made available to Senator Fulbright; that the Government had been directed by the District Court to "focus on any specific document that would prejudice the nation's defense interests" (Opinion, June 24, 1971, p. 3); that the Government had specified and discussed several such documents; and that the District Court had found that disclosure of the specified documents would not be harmful, or that any harm resulting from such disclosure would be insufficient to justify an injunction. The Court of Appeals held:

> ". . . we are satisfied that the Government had appropriate opportunity to make the kind of showing appropriate to justify a prior restraint on the nation's historic free press. Its essential complaint is a dissatisfaction with our conclusion that it has not met its heavy burden of proof." (Opinion, June 24, 1971, p. 3)

The Court of Appeals considered whether comity required it to grant the Government's petition by reason

of the Second Circuit's decision in the *Times* case. It determined, however, that it must decide the Post case on its own record:

> "Considerations of comity may not properly be stretched unduly when what is involved is a prior restraint on the press [which] we do not find constitutionally authorized." (Opinion, June 24, 1971, p. 4)

The Court of Appeals adverted, also, to the fact that, while the Times and the Post were both under restraint, other newspapers throughout the country not so restrained were currently publishing stories based upon and derived from the Vietnam History. With respect to such publications, the Court noted (Opinion, June 24, 1971, p. 5):

> "The increasing disclosures increase our concern, expressed in our opinion yesterday, whether effective relief of the kind sought by the Government can be provided by the judiciary."

Immediately upon denial of its application for rehearing *en banc,* the Government applied to this Court for a stay pending further proceedings against the Times in the Southern District of New York. The most significant aspect of that application, for present purposes, was the absence of any request by the Government that the Post case be remanded for further proceedings in the District Court. The Government was apparently content to rest its case upon the record it had made below. Indeed, the Government has conceded that its record in this case is complete. It stated to this Court, in its "Opposition" to the Times' Vacatur Petition (p. 3):

> "... it [the Government] was unable to prepare as complete a submission as it could present with the

additional time it had available in the *Washington Post* case."

In our *in camera* brief, we demonstrate that none of the evidence, considered singly or collectively, establishes that publication of anything contained in or derived from the Vietnam History will result in any threat to the national security of the United States. Here, we discuss the constitutional and legal issues which, in our view, preclude the relief the Government seeks from this Court.

ARGUMENT

INTRODUCTION

Respondents cannot determine with certainty what questions the Government believes its appeal presents. Certainly, the sole question set forth in the Government's "Application for Stay" (p. 4) is not presented by this appeal: That question assumes, contrary to the findings of the two courts which have passed on the issue, that the Government has met its burden of establishing that publication of the contents of the Vietnam History would pose a grave and immediate danger to the national security.

The difficulty is compounded by the fact that the Government, in the course of this litigation, has continually shifted emphasis in respect of the legal grounds it claims support its right to injunctive relief. When the Government filed suit against the Times less than two weeks ago, it relied principally on 18 U.S.C. § 793 (*d*). By the time it filed suit against the Post a few days later, it had shifted reliance to Section 793 (*e*). At the hearing in the District Court on remand, the Government placed heavy emphasis on its alleged absolute right to classify its documents. In its brief to the

Court of Appeals the emphasis again shifted, this time to the President's power to conduct the foreign affairs of the United States. On oral argument before the Court of Appeals, however, primary emphasis was placed on a proprietary theory, analogous to private rights in literary property and the fiduciary obligations of private individuals. Finally, in its "Application for Stay" to this Court, the Government claimed an absolute right to determine "whether to declassify the material or to authorize its publication. . . ." (p. 2)

Whatever the theory upon which the Government is now proceeding, the facts are such that it cannot prevail: In the light of the findings below that publication of the contents of the Vietnam History would result in no substantial injury to national security, the general constitutional prohibition against prior restraints applies.

I. THE FINDINGS OF THE DISTRICT COURT MUST BE SUSTAINED UNLESS THEY ARE SHOWN TO BE CLEARLY ERRONEOUS.

It is important, at the outset, to comment briefly on the procedural posture of this case. It is hornbook law that, in any case—even a case in which no constitutional principles are at stake—a plaintiff may not obtain the extraordinary remedy of a preliminary injunction unless it can establish to the satisfaction of the Court, not only that it will probably succeed at the final hearing, but also that, absent preliminary injunctive relief, it will suffer grave and irreparable injury. *See, e.g., Industrial Bank of Washington* v. *Tobriner,* 405 F.2d 1321 (D.C. Cir. 1968); *Young* v. *Motion Picture Association of America, Inc.,* 299 F.2d 119 (D.C. Cir. 1962), *cert. den.* 370 U.S. 922 (1962).

The Government has failed to satisfy either of those requirements in the Courts below. Thus, even if this

were a non-constitutional case, the Government could not prevail.

In order to obtain reversal of the District Court's denial of preliminary injunctive relief, the Government, on such an appeal as this, is also required to show that the District Court clearly abused its discretion, *Brotherhood of L. E.* v. *Missouri-Kansas-T. R. Co.*, 363 U.S. 528, 535; *Young* v. *Motion Picture Association of America, Inc., supra; Cox* v. *Democratic Central Committee of District of Columbia*, 200 F.2d 356 (D.C. Cir. 1952); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2nd Cir. 1969), *cert. den.* 394 U.S. 999, and that the findings of fact below were "clearly erroneous." Rule 52(a), F. R. Civ. P.; 5 Moore's Federal Practice ¶ 52.07 at 2732. *See, e.g., Cox* v. *Democratic Central Committee of District of Columbia, supra; Craggett* v. *Board of Education of Cleveland City Sch. Dist.*, 338 F.2d 941 (6th Cir. 1964). *See, also, Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489 (D.C. Cir. 1968); *United States* v. *Brown*, 331 F.2d 362 (10th Cir. 1964). The Government has never even claimed such abuse of discretion or that any of the findings below were erroneous.

This, however, is not an ordinary case. It constitutes a precedent-shattering attempt by the Government to impose a prior restraint which would prohibit the Post from publishing material of the highest political importance concerning the most critical issue facing this nation today. Where such First Amendment rights are involved, the Government bears a burden even greater than is normally the case, for the balance is always weighted in favor of free expression, especially where the proposed infringement involves a prior restraint, *Liberty Lobby, Inc.* v. *Pearson, supra.*

II. THE GOVERNMENT HAS FAILED TO PROVE AN IMMEDIATE AND GRAVE THREAT TO NATIONAL SECURITY.

In formulating the issue to be tried on remand, the Court of Appeals imposed upon the Government the burden of proving that publication of material from the Vietnam History "... would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof ... : See *Near* v. *Minnesota,* 283 U.S. 697, 715-16 (1931)" (Order, June 19, 1971).

The majority Opinion of the Court of Appeals directing remand establishes the nature of the irreparable injury which the Government was called upon to show. The majority stated that, although *Near* v. *Minnesota, supra,* generally prohibited prior restraints on publication, there was a "narrow area, embracing prominently the national security, in which a prior restraint on publication *might* be appropriate" and that "the instant case *may* lie within that area." The majority further noted that, in its view, the law permitted the issuance of "an injunction against publication of material *vitally affecting the national security.* In this case, the Government makes precisely that claim—that publication by appellees will *irreparably harm the national defense.*" (pp. 2-3, Emphasis supplied throughout).

On remand, the District Court observed that it had been directed by the Court of Appeals "to determine whether publication of material from this document would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof." (Tr. 266)

Near, itself, is also indicative of the gravity of the injury the Government was required to establish as an absolute minimum to justify a prior restraint on publication. That case speaks of "actual obstruction" to the Government's "recruiting service," the "publication of the sailing dates of transports," and "the number and location of troops." It seems obvious that the exception to the prohibition against prior restraint was conceived, in *Near,* as embracing only the most serious, immediate and substantial threats to the Government's ability to wage war, imminent risk of death to its military personnel, grave breaches of the national security, and the like.

No such injury was established here.

The District Court did find that publication of the documents "may" interfere with the ability of the State Department to conduct delicate negotiations but, significantly, such interference would result:

> "... not so much because of anything in the documents, themselves, but rather results from the fact that it will appear to foreign governments that this Government is unable to prevent publication of actual Government communications when a leak such as the present one occurs. Many of these governments have different systems than our own and can do this; and they censor." (Tr. 267)

Embarrassment to the United States because foreign governments do not fully comprehend the operation of the principles governing our free institutions is obviously not the kind of injury to the national defense which *Near* contemplated, or which this Court or any other Court should recognize as a reason justifying the abrogation of those hard-won liberties of speech and

press which are the envy of all whose freedoms are suppressed.

The District Court put the Government's case in its proper constitutional perspective when it stated (Tr. 271):

> "In interpreting the First Amendment, there is no basis upon which the Court may adjust it to accomodate [sic] the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting."

III. RESPONDENTS ARE NOT BOUND BY THE GOVERNMENT'S CLASSIFICATION SYSTEM.

It now appears that the Government, having failed to establish to the satisfaction of either of the Courts below that publication of material from the Vietnam History will in fact gravely and irreparably endanger the national defense, intends to reply upon the argument that it may, by its own *ipse dixit*, label or classify any of its documents "Top Secret" or "Secret"; that its decisions in this regard are not subject to challenge, judicial or otherwise, even where those documents come into the hands of third parties; and that the Government may thereby preclude publication of the contents of those documents. Thus, the Government conveniently seeks to relieve itself of the burden which the Courts below—and the Constitution—impose upon it.

We anticipate that the Government will argue, as it did in the District Court, that it has the statutory power to classify documents; that this power may be exercised by any designated governmental employee who need

never be named or produced;[5] and that once a classification has been imposed, it may not successfully be challenged even in a declassification proceeding unless it can be established that the Government's classification was arbitrary and capricious. This argument conveniently ignores the fact that we are not here involved with a declassification proceeding in respect of a document exclusively within the custody or control of the Government. This is a case where the Government seeks, through prior restraint, to preclude publication of material in the hands of a willing publisher who is neither an employee nor an agent of the Government.

We are here concerned with a constitutional case. The question is whether prohibition of publication of historical documents constitutes a violation of the First Amendment. The Government's use of labels—even "Top Secret-Sensitive"—does not relieve the Courts of their duty independently to determine, on the basis of the record made below, whether the injunction the Government here seeks would, if issued, impinge upon the Respondents' First Amendment rights. *Wood* v. *Georgia*, 370 U.S. 375, 386; *Craig* v. *Harney*, 331 U.S. 367.

As was said in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429:

> "... a state cannot foreclose the exercise of constitutional rights by mere labels."

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[5] In this case, for example, whoever classified the Vietnam History was not identified, much less submitted to cross-examination, despite the District Court's specific instruction that this individual appear.

In *New York Times* v. *Sullivan*, 376 U.S. 254, the Supreme Court said (at 285):

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S. Ct. 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v. Florida, 328 US 331, 335, 90 L ed 1295, 1297, 66 S Ct 1029; see also One, Inc., v. Olesen, 355 US 371, 2 L ed 2d 352, 78 S Ct. 364; Sunshine Book Co. v. Summerfield, 355 US 372, 2 L ed 2d 352, 78 S Ct 365. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 US 229, 235, 9 L ed 2d 697, 702, 83 S Ct 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

IV. MISCELLANEOUS CONTENTIONS OF THE GOVERNMENT.

We have already adverted to the various shifts of emphasis which have characterized the Government's legal position as this suit has progressed—shifts which, since we do not have the Government's brief, make it difficult to predict the legal arguments on which the Government will rely in this Court. Accordingly, we address ourselves briefly to the various miscellaneous contentions heretofore advanced by the Government at

one stage or another, without attempting to evaluate the emphasis the Government may place on those arguments here.

(a) 18 U.S.C. § 793(e)

Although the Government at one point relied on Section 793(e) of U.S.C., Title 18, as the sole statutory support for its application for a preliminary injunction, it ignored the fact that Congress, in amending that statute in 1950 provided in Section 1(b) of the amendatory statute that:

> "Nothing in this Act shall be construed to *authorize*, require, or establish military or *civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States* . . .". (P.L. 831, 81st Cong. 2d Sess. Sept. 23, 1950, c. 1024, Tit. I) (Emphasis supplied)

We also note that Judge Gurfein, in the *New York Times* case, has expressly held, for the many reasons set forth in his opinion, that Section 793(e) does not even apply to publications by newspapers. In any event, we do not see how Congress can, by legislation, set aside the mandate of the First Amendment.

(b) The "Property" Theory

In oral argument below, the Solicitor General claimed for the Government some sort of vague, undefined proprietary right in the *contents* of the Vietnam History; and the Government's claim to injunctive relief was analogized to injunctions against copyright infringements.

While it is unclear whether Congress could constitutionally grant to the Government a proprietary interest in its documents, *Wheaton* v. *Peters*, 33 U.S. (8

Peters) 591, 668, Congress has not done so. *Public Affairs Associates, Inc.* v. *Rickover,* 284 F.2d 262 (D.C. Cir. 1960), *vacated on other grounds,* 369 U.S. 111, *on remand,* 268 F.Supp. 444 (D.D.C. 1967). To the contrary, the copyright statute itself expressly provides that "No copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part, thereof . . ." 17 U.S.C. § 8. In short, Congress has dedicated to the public whatever historical content or literary property rights might otherwise reside in the Government. *Greenbie* v. *Noble,* 151 F. Supp. 45, 65-66 (S.D.N.Y. 1957).

This dedication is squarely grounded upon the right of the people to know. As noted in *Scherr* v. *Universal Match Corporation,* 297 F.Supp. 107, 110 (S.D.N.Y. 1967), *aff'd.* 417 F.2d 497 (2d Cir. 1969), *cert. denied,* 397 U.S. 936:

> "... the fundamental purpose underlying the prohibition [against Government copyrights] which is based on 'the necessity of wide public dissemination of the contents of materials produced by and relating to issues and problems of national interest * * * [which] policy is unquestionably a desirable one in a democracy, much of whose success is dependent on a well-informed public.' "

Reference to *Near* v. *Minnesota,* 283 U.S. 697, is apposite here. In that landmark case, this Court drew a clear distinction between an injunction to prohibit publication based upon the protection of private rights and an injunction suppressing speech when it said (p. 716):

> "Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."

This distinction was reaffirmed by this Court little more than a month ago, in *Organization For A Better Austin* v. *Keefe*, 39 U.S.L.W. 4577, 4578 (May 17, 1971):

> "... Under *Near* v. *Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, *the injunction operates not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000.*" (Emphasis supplied)

Nor can an injunction be justified on the ground that the Government has some ephemeral right of a private nature, based upon the economic value of the information contained in the Vietnam History. *See, e.g., Pearson* v. *Dodd*, 410 F.2d 701, 707-08 (D.C. Cir. 1969) *cert. den.* 395 U.S. 947. Obviously, we are not dealing here with information which the Government prepared with a view to a sale for profit, nor is the Vietnam History an instrument of commercial competition analogous to patents, commercial secrets and industrial "know-how." The Government has never claimed that this proceeding was brought to prevent the dilution of any economic interest deriving from its alleged proprietary rights in the Vietnam History. The only reason the Government brought this proceeding was to suppress information contained in the Vietnam History—to deprive the general public of its contents.

(c) The "Stolen Documents" and "Breach of Trust" Theories

The Government seeks to buttress its claim for injunctive relief through employment of labels in lieu of proof: It describes the Vietnam History as having been illegally obtained and held by the Post without author-

ity. The Solicitor General, in the oral argument before the Court of Appeals, also made reference to a theory based upon what he termed a "breach of trust."

Assuming, *arguendo*, that the Government has a proprietary interest in copies of the Vietnam History made by a third party without the Government's knowledge or authorization, the record contains no evidence whatsoever which would support a charge that the Vietnam History was illegally obtained by the Post or its source.

In any event, how the Post obtained its copy of portions of the Vietnam History is essentially irrelevant on this appeal. As the Court of Appeals noted in *Pearson* v. *Dodd*, 410 F.2d at 705:

> ". . . where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained."

Relevant, also, are the observations of District Judge Holtzoff in *Liberty Lobby, Inc.* v. *Pearson*, 261 F. Supp. 726, 728-9 (D. D.C. 1966), *aff'd.* 390 F.2d 489 (D.C. Cir. 1968):[6]

> "The only matter that the Court has before it at this time is the question whether it may enjoin

[6] The Court of Appeals was not necessarily prepared to go as far as Judge Holtzoff, and found it unnecessary to pass on the issue. It noted by way of *dictum*. (p. 491):

> "Upon a proper showing the wide sweep of the First Amendment might conceivably yield to an invasion of privacy and deprivation of rights of property in private manuscripts. But that is not this case; here there is no clear showing as to ownership of the alleged private papers or of an unlawful taking and no showing that Appellees had any part in the removal of these papers or copies from the offices of Appellants or any act other than receiving them from a person with a colorable claim to possession."

newspaper men from publishing copies of documents or information contained in documents that the newspaper men consider newsworthy, merely because the information or copies were obtained by a breach of trust.

The Court is of the opinion that freedom of the press that is safeguarded by the Constitution and which is one of the basic features of American institutions, is not limited to such information as is personally obtained by newspaper men by observation or from official statements, or in any other open way. The mere fact that a newspaper man obtained information in a clandestine fashion or in a surreptitious manner or because someone unguardedly and unwittingly reveals confidential information, or even through a breach of trust on the part of a trusted employee, does not give rise to an action for an injunction. The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral. It would be a far-reaching limitation on the freedom of the press if courts were endowed with power to review the manner in which the press obtains its information and could restrain the publication of news that is obtained in a way that the Court does not approve. If such were the law, we would not have a free press; we would have a controlled press. Such, however, is not the law.

Cases involving publication of letters in violation of a property right in them or in violation of a copyright are not in point. Here we are dealing with the freedom of the press."

(d) Freedom of Information Act

The Government argues that Respondents, prior to publishing any information contained in the Vietnam History, should have sought and obtained declassification pursuant to the procedures established by the Freedom of Information Act. (Memorandum in Support of Motion for Preliminary Injunction, p. 10) This is truly a "Catch-22" argument, since the Government also contends that the Vietnam History is not subject to declassification pursuant to the Freedom of Information Act. (Memorandum in Support of Motion for Preliminary Injunction, p. 13) In any event, some idea of the speed with which information may be obtained by those who pursue Freedom of Information Act procedures can be gleaned from *Epstein* v. *Resor,* 421 F.2d 930 (9th Cir. 1970), *cert. den.* 398 U.S. 965, where it appears that the plaintiff waited some three years or more only to learn that he could not obtain access to documents some twenty-four years old.

(e) The Inherent Power—Foreign Relations Argument

The Government apparently relies on the so-called "inherent power" of the President, deriving, in the circumstances of this case, from his responsibility for the conduct of foreign affairs. This theory is readily disposed of. As this Court made plain in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, the President has no such "inherent power." Nor may the President, in his role as the executor of the foreign policy of the United States, deprive American citizens, whether here or abroad, of the rights guaranteed them under the Bill of Rights. *Reid* v. *Covert,* 354 U.S. 1; see, also, *Kent* v. *Dulles,* 357 U.S. 116; *Murray* v. *Vaughn,* 300 F. Supp. 688, 703 et seq. (D.R.I. 1969).

V. THE GOVERNMENT'S ACTION SHOULD BE DISMISSED BECAUSE THE RELIEF SOUGHT, IF OBTAINED, WOULD BE FUTILE.

It has already become obvious that, despite the continuation of this ill-conceived litigation, the Government's efforts to suppress the truth will not prevail. Copies of all or substantial portions of the Vietnam History have already found their way into the hands of an undetermined number of persons outside the Government.

During the past seven days, the Boston Globe, the Chicago Sun-Times, the Baltimore Sun, the Los Angeles Times, and the Knight chain of newspapers, serving eleven major American cities—cities such as Philadelphia, Detroit and Miami—have all run stories based, apparently, on the Vietnam History. The Justice Department has taken no action to restrain any of these newspapers other than the Globe, and we understand that a Justice Department spokesman indicated the Government does not intend to do so.

Thus, one thing is certain: Public revelations of the contents of this controversial History will continue apace until it will all become available to the American public. Under the circumstances, no useful purpose is served by a continuation of this litigation, and for this reason, too, the decision of the Court of Appeals should be affirmed.

As the District of Columbia Court of Appeals said in *Dombrowski* v. *Burbank*, 358 F.2d 821 (D.C. Cir. 1966), *aff'd in part, rev'd in part on other grounds, sub nom. Dombrowski* v. *Eastland*, 387 U.S. 82, in which the Court refused to enjoin a member of a Senate Sub-committee from disclosing certain documents because other

members of the Sub-committee were not similarly sought to be enjoined, the Court said (p. 824):

> "'A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.' *Virginia Railway Co.* v. *System Federation No. 40,* 300 U.S. 515, 550, 57 S.Ct. 592, 601, 61 L. Ed. 789 (1937)."

Thus, even without regard to the First Amendment principles to which we have adverted, the decisions of the Courts below to deny injunctive relief should be affirmed. *See, e.g., Humble Oil & Refining Company* v. *Harang,* 262 F. Supp. 39, 43-44 (E.D. La. 1966); *Elliott* v. *Amalgamated Meat Cutters, Etc.,* 91 F. Supp. 690, 698 (W.D. Mo. 1950).

CONCLUSION

For the reasons assigned, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia should be affirmed.

William R. Glendon
Roger A. Clark
Anthony F. Essaye
1730 K Street, N. W.
Washington, D. C. 20006

Leo P. Larkin, Jr.
Stanley Godofsky
200 Park Avenue
New York, N. Y. 10017

Of Counsel:

Royall, Koegel & Wells
1730 K Street, N. W.
Washington, D. C. 20006

200 Park Avenue
New York, N. Y. 10017

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